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IN THE

Supreme Court of the United States

NO. [redacted] 195

——— Term, 1964

GENERAL WAREHOUSEMEN AND EMPLOYEES UNION NO. 636 (AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA)

v.

AMERICAN HARDWARE SUPPLY COMPANY (OTHERWISE KNOWN AS AMERICAN HARDWARE STORES), A PENNSYLVANIA CORPORATION, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court:

The Petitioner, American Hardware Supply Company, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit which affirmed the decision of the United States District Court for the Western District of Pennsylvania refusing Petitioner's Motion for Summary Judgment and granting the Motion of General Warehousemen

and Employees Union No. 636, affiliated with the "Teamsters", (hereinafter called the "Union") for Summary Judgment. Petitioners Motion was based, inter alia, upon the payment and retention of agreed severance pay. The Union's Motion was based upon its contention that the matter was arbitrable.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 329 Fed. 2d 789 and appears in the Appendix hereto at page 29.

The opinion of the United States District Court of the Western District of Pennsylvania has not been reported but appears in the Brief and Appendix for Appellants filed in the Circuit Court of Appeals at page 29a.

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on March 25, 1964. The Order denying Rehearing was entered on April 23, 1964.

The jurisdiction of your Honorable Court is invoked under Title 28 U.S.C.A. Section 1254 (1).

QUESTION INVOLVED

When the Union files a Complaint under 29 U.S.C.A., Section 185 (a), (b) and (c) to compel arbitration of Petitioner's severance of its employees, is Petitioner entitled to summary judgment when:

1. The Labor Agreement, negotiated after an economic strike of several months duration, included *for the first time* the following:

(a) A provision limiting the Union's representation to Petitioner's employees at its *only* warehouse in Allegheny County, Pennsylvania;

(b) A provision that when the Petitioner, *in its sole judgment* decides to discontinue operation of any portion of its said warehouse, and such discontinuance would result in the permanent termination of employees, said employees should receive a severance allowance (fixed by the Agreement); and

(c) A provision that employee seniority is terminated upon severance as aforesaid; and

2. The Petitioner in discontinuing its operations at said Allegheny County warehouse severed some sixty odd employees paying to each of them the agreed severance pay which they ever since have retained; and

3. Upon the severances, neither the Union nor the severed employees resorted to the grievance or abritration procedure provided by the Agreement, but immediately established and maintained a picket line at and exerted economic pressure at Petitioner's new Butler County warehouse (which picket line and pressure still continues) thereby causing Petitioner economic loss; and

4. Nearly a year later, the picket line and pressure being unavailing, the Union filed this proceeding to compel arbitration, alleging as the alleged basis for arbitration a claim never before raised by it. *This claim alleges, in summary, "discharges" instead of severances.*

THE STATUTES INVOLVED

Title 29, U.S.C.A., Sections 185 (a), (b) and (c) are as follows:

"185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment

against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 29 U.S.C.A. 185 (a), (b) and (c) by the Union (a labor organization within the meaning of and as defined by Title 29 U.S.C.A. Section 152) against the Petitioner (an employer as defined by said Title 29 and Section 152).

The case is concerned with Petitioner's severance of its employees; the payment and retention by them of the agreed severance pay and the right of the Union, after using economic pressure for almost a year thereafter (without attempting to resort to the grievance procedure), then to use Section 301 of the Labor Management Relations Act (29 U.S.C.A. Sect. 185) to compel arbitration of a specious claim (not theretofore made) as a vehicle to recapture, wholly or in part, the bargain made by the Union at the bargaining table.

Petitioner is a cooperative corporation distributing hardware at wholesale to its retail hardware dealer members in Pennsylvania, Ohio, West Virginia and other states. The Union is the General Warehousemen's Union No. 636 affiliated with the "Teamsters."

Petitioner's only warehouse was in Pittsburgh, Allegheny County, Pennsylvania, and it and the Union have been parties to labor contracts negotiated by them since 1941.

In 1960, after an economic strike of several months duration, the parties entered into a new labor agreement effective from 9/8/60 to midnight 7/1/63 (set forth in full in the Appendix for Appellees filed in the Circuit Court at p. 3b to p. 13b.

This new contract contained, *for the first time* in the contract history between the parties, the following *new* provisions:

IA — In Article I — RECOGNITION (said Appendix p. 4b and 5b), a new paragraph defining the employees in the bargaining unit as follows:

> "(b) The term 'employee' or 'employees' as used in this Agreement shall mean *all persons employed by the Company at its wholesale house located in Allegheny County, Pennsylvania* exclusive of management and supervisory personnal, sales representatives, office employees, janitors and watchmen."

II — A new ARTICLE XII — SEVERANCE CLAUSE (said Appendix p. 10b and p. 11b) as follows:

> "(a) *When, in the sole judgment of the Company, it decides to discontinue operation of any portion of its wholesale house; the subject of this Agreement; and if said discontinuance of operations would result in the permanent termination of employment of individuals covered by this Agreement; said terminated employees shall be entitled to a severance allowance in accordance with and subject to the following provisions:*
>
> "1. In lieu of severance allowance, the Company may offer an eligible employee a job in the job classification to which his seniority and job ability qualifies him. If offered, the employee shall have the option of accepting such new employment, or requesting his severance allowance.

Note—All italics in this Petition are ours.

"2. If the employee accepts such other employment, his continuous service record shall be deemed to have commenced as of the date of starting on the new employment; except for purposes of vacation his continuous service shall be maintained and not be deemed to have been broken by the change in employment.

"3. If said change in employment results in the permanent displacement of some other employee, the latter shall be eligible for severance pay provided he otherwise qualifies under the terms of this section.

"(b) *An eligible employee shall receive severance allowance computed on the same basis as provided for vacation pay.*"

III — A new subsection 4 of paragraph (e) of ARTICLE VI — SENIORITY (Appendix p. 7b to p. 9b) so that paragraph (e) reads as follows:

"(e) An employee shall be taken off the seniority list at once and no longer regarded as an employee of the Company for any of the following reasons:

"1. If the employee quits.

"2. If the employee is discharged.

"3. If the employee fails to report for work from a lay-off within seventy-two (72) hours from the date of the registered letter notifying him to do so.

"4. *If the employee is severed in accordance with Article XII of this Agreement.*"

There were carried into the new contract the prior Management — Article II (said Appendix p. 5b); the prior "no strike — no lockout" clause — Article IX (said Appendix p. 9b); and the prior Grievance Procedure — Article III (said Appendix p. 5b to p. 7b).

The matter of the removal of the warehouse was an issue in dispute during the strike and the contract negotiations. (Note 1).

On January 27, 1961, Petitioner announced to its Allegheny County employees that it was going to relocate its operations into a new building to be constructed in Butler County, Pennsylvania; that after the building was ready it would take some months to effect the change-over, the whole program would take about a year and Petitioner would keep its employees informed. (Exhibit 2 of the Complaint; Appellees Appendix p. 14b). On June 30, 1961, Petitioner informed its employees that the Butler construction was ahead of schedule and the new building could be completed shortly after September 1, 1961. (Exhibit 6 to the Complaint, Appellees Appendix 20b). Prior to September 7, 1961, Petitioner had informed the Union and had posted a Notice in the Allegheny County warehouse that the procedure for any person desiring employment in Butler was to make his application at the Butler Employment Office where applications are being processed. The Union disregarded this and sent written applications for employment to the Company, which applications were returned with a re-

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Note 1 The Union attached to its Complaint all correspondence between it and the Company. (See the underlined statements in Exhibit 5, Appellees Appendix p. 18b).

statement of the procedures set forth in the Notice (See Exhibit 10 to Complaint, Appellees Appendix 24b). *No applications for employment ever were made under the prescribed procedure (Note 1).* Of greater significance is the fact that the applications forwarded by the Union were applications for *new* employment and *not* for "employment and transfer" as alleged in the Complaint (See Exhibit 9 to the Complaint, p. 38 of the Appendix to this Petition, which the *Union* did not print nor refer to in the Court below.) (Note 2)

Note 1 — The Circuit Court is factually wrong in its statement, p. 4 of the Opinion, when it said: "Many of the employees had previously applied for employment in the new Butler County warehouse, but were refused."

Note 2 — Prior to the application episode the Union made the following specious claims:

a. In March of 1961, it demanded to know whether Petitioner intended to give its employees an opportunity "to follow their work" to Butler. Receiving no reply, it reiterated the demand and asked arbitration of this demand. The Defendant replied by referring to Article XII of the contract (See Exhibits 3, 4 and 5 to the Complaint. Appellees Appendix p. 15b, 16b and 18b). (The Union knew the contract provisions and that Petitioner had breached none of them. *It pressed this matter no further.*)

b. In August 1961, Petitioner had employed a few persons at Butler and the Union demanded arbitration on the grounds that the seniority provisions required employment of Allegheny County "laid off" employees. The Petitioner again refused. (See Exhibits 7 and 8 to Complaint, Appellees Appendix p. 21b and 23b). The Union knew the seniority

Statement of the Case.

The Petitioner severed its Allegheny County employees as follows: 35 on September 15, 1961; 10 on October 13, 1961; 15 on November 17, 1961 and 2 on January 1, 1962; in each instance paying to them the agreed amount of severance pay (See Appellants Brief and Appendix, p. 18a). The amount of the severance pay is not in dispute. ***Each severed employee accepted and reained his severance pay.*** (This fact is not in dispute, but at time of payment *oral* protest was made because the amounts of severance pay were included in one check together with wages and accrued vacation pay. *No grievances were filed, nor any other steps taken under the grievance procedure.*

On September 18, 1961, after the severance of 35 employees and before severance of the rest of the Allegheny County employees the Union began to picket the Butler warehouse and the picket line continues to this very day with the result that many carriers refuse or and refuse to cross the picket line causing additional cost and expense to Petitioner. (See Brief and Appendix of Appellants, p. 27a-28a).

(Note 2 cont.) provisions were applicable only in Allegheny County. *It did not press this further and, in its Complaint does not assert that there were any "laid off" employees in Allegheny County.* The truth is, that except for quits and retirees, every Allegheny County employee who worked under the current labor contract worked at the Allegheny County warehouse until he was severed. (These abandoned demands were only specious attempts by the Union to evade the bargain made at the negotiation table. If the Union had not made these unfair efforts, it may be that some of the employees would have been hired at Butler.)

On July 5, 1962 (the Petitioner not having yielded to the economic pressure) the Union resumed its concept of trying to recapture its bargain by arbitration, and filed its Complaint in the District Court. In this Complaint, the Union claimed *for the first time* that the Petitioner did not have "the right, during the contract period, to bring about the *discharge* of the covered employees by removing their work to another warehouse where new employees were hired." There were no factual averments that any work had been removed. There were no discharges — only the aforesaid severences. The Union representation was limited to Allegheny County. The Union Motion for Summary Judgment (Appellees Appendix p. 25b) for arbitration was granted and that of the Petitioner (Brief and Appendix for Appellant, p. 15a) based on severance was denied. The Court of Appeals upheld the decision of the District Court.

ARGUMENT

The decision of the lower Courts should be reversed and Petitioner's Motion for Summary Judgment granted.

The Union has raised no dispute as to the contractual provision that its representation of Petitioner's employees is limited to "persons employed by the Company at its wholesale house located in Allegheny County, Pennsylvania".

In *Oddie v. Ross Gear & Tool Co.*, 305 F. 2d 143 (CA 6 1962); cert. denied 371 U. S. 941, the Court found that the Company recognized the Union as the exclusive representative of employees within the city limits of Detroit and gave seniority and recall to work rights to employees in the Detroit plant. It also found that these rights were not "vested" or "earned" and that they could be terminated by discontinuance of business or be bargained away by the union. The employees' rights having been limited to Detroit, the Court held that there were no seniority rights to employment at another plant upon termination of operations in Detroit.

The Court on page 150 of its opinion then stated:

> "Since no rights were acquired, we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration."

This is the basic premise raised in our own case. The labor contract states clearly and openly that it is only applicable to:

"persons employed by the Company at its wholesale house located in Allegheny County, Pennsylvania." (Appellant's Appendix 13a)

The agreement provides no rights, vested or otherwise, to employment in a new plant located outside Allegheny County.

In our case, the Union did more than agree upon this geographical limitation. It agreed in the new clauses of the labor agreement to the Petitioner's *unqualified* right to close down operations, to sever employees and thereby to terminate their seniority upon paying the agreed severance pay.

The Union, cognizant of its bargain, sought to evade it by specious use of the arbitration clause. It demanded arbitration, before any severances occurred, with respect to the right to "follow the work" and "seniority preference in Butler" of "laid-off employees', fully knowing that under the contract, the employees had no such rights outside Allegheny County and the Petitioner had no obligations outside Allegheny County. Those are the reasons that the Union abandoned those demands for arbitration and why the Union sponsored the filings of applications for new employment in Butler. It takes no expert reading between the lines to recognize that some of the employees were not willing to accept the consequences of the contractual bargain which others were willing to take the risk of action upon new applications. It takes no expert in Union philosophy to know that it requires uniform treatment of the members of the bargaining unit. Those are the reasons why the Union forwarded all the applications instead of following the prescribed proce-

dures. This is the reason why employees individually applied thereafter for employment. The important thing, however, is that the applications were for *new* employment.

The abandonment of the demands and the applications for new employment plainly show that the Union well knew the bargain with respect to severance and that there could be no good faith dispute thereunder so long as the agreed severance pay was given.

At the times of severance, there were oral protests about the checks. (We never knew of a severance without some protests at the time.) The amount of pay was correct and the resort to picketing instead of to the grievance or arbitration features of the labor contract again was an acknowledgment by the Union that there were no contract violations and no arbitrable disputes and the only possible remedy was by economic pressures.

The Court of Appeals, we believe, recognized these points when it said, Opinion p. 5, "We think it would be error to succumb to the enticing temptation to determine at the outset whether the asserted controversy is palpably unfounded on the merits."

The Court of Appeals did not so "succumb" by reason of misunderstanding of your decisions in the Trilogy and more particularly in the American Manufacturing case. (See discussion at page 34, 35, Appendix hereto)

The Court of Appeals erroneously held that the Union's *claim* (made nearly a year after severance) that the Company did not have the right, during the contract period, to bring about the "discharge" of the covered employees by removing their work to another warehouse

where new employees were hired, entitled the Union to arbitration under the provisions of the grievance clause and management clause.

This is completely unrealistic for the following reasons:

1. *The claim which the Court of Appeals held to be arbitrable never was asserted by the Union until nearly a year after the severances and, it is apparent upon the face of the Complaint that this was an afterthought developed by the Union only when it found it could not negate its contract bargain by economic pressures it exerted for nearly a year.*

2. The Union claim that Petitioner "did not have the right, during the contract period, to bring about the discharge of the covered employees by removing their work to another warehouse where new employees were hired", is specious upon its face. There was no discharge of any employees and the Union admits they were severed and retained the agreed severance. There is no factual allegation by the Union that any work was removed to the new warehouse and, in fact, no work nor merchandise was so removed. Every severed employee worked full-time until severed. There is no contractual provision which the Union claims is violated. Its claim is nothing but a "stock" phrase speciously asserted for the first time in a desperate effort to salvage part of the contract bargain after economic pressures were unavailing. To hold this claim is arbitrable is to negate the unconditional right to discontinue operations and sever employees agreed upon in Article XII of the Labor Contract. The Court of Appeals did not examine the Union's claim in the light of its own pleadings. Had it done so, it would

have reached the conclusion that it was a specious claim asserted too late, in bad faith, to destroy the bargain made at the negotiation table.

3. The Court of Appeals has ignored the Union's violation of two provisions of the labor contract: Article IX (providing for no strikes, stoppages of work, slowdowns, refusals to work assignments or any other interference with or impeding of work or operations by the Union or any of the employees) and Article III (prescribing the Grievance Procedure and fixing five (5) days after the occurrence for the beginning of the grievance). The Court's action is all the more serious since the matter involves severance. The Court's action allows the unlimited use of economic pressure to redress a grievance and an unlimited time (one year? five years?) to seek arbitration of the alleged grievance despite the exertion of the pressures banned by the labor contract. The Court's action simply means there can be no finality about action under and in accordance with clear contract provisions. The decision further allows a party to "eat his cake and have it too", for it allows a party who breaches industrial peace to have the very arbitration which is designed to maintain industrial peace.

4. The Court of Appeals resorted to an unrealistic fiction in determining the Petitioner ever had agreed to arbitrate the Union's claim.

a. Under no sound construction of the labor contract can it be held that Petitioner ever agreed to arbitrate a claim of grievance first asserted nearly a year after the occurrence.

b. Under no sound construction of the labor contract can it be held that Petitioner ever agreed to arbitrate its right to sever employees given it *in its sole judgment* by the terms of Article XII., provided, of course, Petitioner paid the agreed severance pay. (This payment was made and the amount is not in dispute)

Article XII is what the late Dean Shulman, in speaking of labor contract provisions, calls a provision of "objective criteria, almost automatically applicable". (See the Warrior case, 363 U. S. 574 at 580.) So long as the agreed severance payments were made, as here, the Article *is* automatically applicable. It cannot be asserted that the Petitioner ever agreed to arbitrate a matter which the contract clearly placed in the Petitioner's sole judgment.

The Court of Appeals overlooked this phase of the case in its entirety and automatically applied the provisions of separate Articles II and III to reach the improper result.

5. The Court of Appeals considered the Union's use of economic pressures for nearly a year before resorting to the Grievance Procedure. It must have done so in the belief that these actions went to the merits of the grievance and were for the arbitrator. However, these actions are entitled to far greater cognizance, for they also go to *the right of the Union to compel arbitration.*

While Section 301 of the Act gives the Courts power to specifically enforce arbitration, it actually confers jurisdiction upon the Federal Courts to compel specific performance—an equitable remedy subject to equitable defenses.

Where, as here, the grievance is not asserted until nearly a year after the occurrence and exerting economic pressures in the interim, the Union's actions are a complete defense to the equitable remedy sought by it. (Note 1)

6. The case is clearly governed by the principle that the demands are "so plainly unreasonable that the subject matter must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction. See Warrior and Gulf, supra, at 582-583." (The above quotation comes from the decision of your Honorable Court in the case of John Wiley & Sons, Inc. v. Livingston decided on March 30, 1964. . . . .U.S. . . . . , 11 L ed 2d 898, 84 S Ct. . . .

No case cited by the Appellees in the Court below rules this case.

In summary, the Courts erred in granting arbitration of the specious claim filed by the Union where the parties agreed in the contract that the severance was in the sole discretion of the Company. To allow the Union to resort to economic pressures and, when they are unavailing, to resort, a year later, to the arbitration agreement, is unsound. This is all the more evident when examination of the Union's claim plainly shows it is nothing but a belated specious attempt to destroy the bargain made in good faith at the negotiation table.

Note 1. There are other equitable defenses available to Petitioner, e.g., acceptance and retention of severance pay.

REASONS FOR GRANTING THE WRIT

I. This Case Is of Extreme National Importance in the Labor Management Relations Field.

If the decision of the Circuit Court is permitted to stand, it is authority for the following propositions:

A. Either party to a labor contract may resort to economic pressures for a year or more after an occurrence under a labor contract and, when those pressures prove unavailing, may compel arbitration of a grievance never asserted until the action is filed in Court.

B. Either party to a labor contract may compel arbitration of any naked assertion of claim regardless of the fact that the claim upon its face is expressly governed by a plain contractual provision and no facts are presented to support the claim.

C. Either party to a labor contract may use the arbitration clause, by asserting a specious claim, to recapture part or all of a plain contractual bargain made at the negotiation table.

D. Either party to a labor contract can resort to strike or lockout and, only when such banned remedies prove ineffective, can fall back upon the grievance procedure.

E. There is no finality of any severance made in accordance with express contract provisions [even where the agreed severance is paid and retained by the former employees] unless and until an arbitrator has passed upon a claim of grievance first asserted long after the severance.

F. Arbitration under an arbitration clause will be compelled where the claim shows upon its face that it cannot be sustained without granting the moving party *new* rights.

G. Courts will compel arbitration at the instance of either party without regard to how long after the occurrence the grievance is asserted and without regard to contractual limitations as to the presentation of grievances.

H. The only criterion for Court determination of an action to compel arbitration is the mere existence of an arbitration clause in the labor contract.

I. This is unsound for where one article of the contract unqualifiedly vests the decision as to severance in the sole control of the company (except for the payment of agreed severance pay), it cannot be held that the exercise of that *discretion* is an arbitrable matter (when, the agreed severance pay is paid and retained).

II. The Court of Appeals Has Decided a Federal Question in Conflict With Your Decisions in the Trilogy and, Particularly in the American Manufacturing Company Case. This Calls for the Exercise of Your Honorable Court's Power of Supervision.

In the case of *United Steelworkers of America v. American Manufacturing Company,* 363 U. S. 564; 4 L. ed 2d 1403; 80 Sup. Ct. 1343, you ordered arbitration as to the *application* of the seniority clause to the claimed right of a man to return to work although he had settled a workmen's compensation case upon a partial permanent disability basis.

In that case, there was no contractual provision barring the application of the seniority clause to employees who had made such compensation cases. The American Manufacturing Company was continuing its operations and the Union presented: (1) a claim as to the application of the seniority clause and (2) the *facts* as to the occurrence as to which application was sought. There was a prima facie case for having the matter submitted to arbitration under the agreed clause.

The case (which the Court of Appeals says is controlling) bears no resemblance to the instant case. No contract clause was involved which placed the matter sought to be redressed in the "sole judgment" of the Company. There was no use of economic pressure in violation of the contract. There was no delay of nearly a year after the occurrence before presenting the grievance. No severance clause was involved, nor was there acceptance and retention of severance pay. The Union there presented a forthright claim based upon the asserted facts.

In the case of *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574; 4 L.ed 2d 1409; 80 S. Ct. 1347, you ordered arbitration under the management clause with respect to the Company's *practice* of farming out work. You said, 4 L. ed 2d 1418; 363 U. S. 584, with respect to the clause "strictly a function of management" that it "must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. Respondent claims that the contracting out of work falls within this category. Contracting out work is the basis of many grievances; and that type of claim is grist is the mills of arbitrators." You ordered arbitration, commenting that contracting out could have been but was not excluded from the grievance procedure or that there could have been a collateral agreement to the same effect. You added "Nor is there any showing that the parties designed the phrase 'strictly a function of management' to encompass any and all forms of contracting out". You indicated that had there been such exclusion, collateral agreement, or showing, the matter would not be arbitrable. The opinion is actually authority for the proposition that there is nothing arbitrable in the instant case (since the amount of severance pay is not in dispute) by reason of the fact that the right of severance was in the "complete control and unfettered discretion" of Petitioner. (Note 1)

The exercise of that control and discretion by Petitioner cannot be upset by a specious claim first asserted nearly

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Note 1 Of course, the case has all the other dissimilarities shown in the Warrior case.

a year after the severance upon failure of the economic pressures.

The case of *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U. S. 593, 4 L. ed 2d 1424; 80 Sup. Ct. 1358, is not an arbitration case, but was brought to compel compliance with an arbitrators' award. The question arbitrated, however, was the matter of reinstatement and back pay for "sympathy" strikers who were discharged. The contract contained an express provision that should an arbitrator find that an employee was improperly discharged, reinstatement and back pay could be awarded. There was no exclusion of discharge of "sympathy strikers."

The theory of these cases is that the parties should submit to arbitration what they agreed to arbitrate; thus the court should not be substituted for the arbitrator; that special heed should be given to the context in which collective bargaining agreements are negotiated (American Mfg. case); that gaps in the agreement are to be filled in by reference to the particular industry and of the shops; and, that while the bargaining agreement states the rights and duties of the parties, it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate and are to be disposed of under the common law of the shop. (Warrior case). The basic concept is that the arbitration clause is enforceable in order to maintain industrial peace.

The cases do not hold, however, that:

1. A matter which the agreement expressly placed in the sole discretion of management is subject to arbitration, regardless of the scope of the arbitration clause.

—(In fact, the opinions plainly show that an unreasonable claim is not arbitrable, nor is one where an arbitrators award could not be given judicial sanction.)

2. A party can breach the "no strike" clause for nearly a year and *then* resort to arbitration. (In fact, the cases hold to the contrary, for the arbitration clause is to preserve industrial peace and the consideration for it. The cases do not give *both* remedies for a claim of grievance.)

3. A party can accept and retain the benefits of severance pay, resort to economic pressures and, nearly a year later contest the severance by calling it a "discharge." (The philosophy of the opinions is to hold the parties to their contracts and *not* to require arbitration after the acts of the moving party have clearly demonstrated an acquiescence in the plain provisions of the labor contract.)

4. The acts of a party *after the alleged occurrence* cannot be considered as a defense to an action to compel arbitration. (The opinions state the courts should not pass upon the merits of the grievance—an entirely different thing.)

The Court of Appeals has misapplied and misapprehended the said decisions of your Honorable Court, thereby deciding a Federal Question in conflict with the applicable decisions of your Honorable Court; has so far departed from the accepted course of judicial proceedings, and so far sanctioned the departure of the lower court as to call for the exercise of your Honorable Court's power of supervision.

III. The Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Courts of Appeals in the Same Matter.

In the instant contract, the Grievance Procedure—Article V (Appellees Appendix p. 5b) establishes the following procedure for grievance:

Stage 1—Written report within 5 days after the occurrence.

Stage 2—Decision within 10 days after joint submission in writing.

Stage 3—If no decision under Stage 2 within 10 days, then submit to arbitrator to be jointly selected through procedures of American Arbitration Association. Arbitrators award within 30 days.

After the severance, the Union followed none of the Grievance Procedures; resorted to economic pressures for nearly a year and *then* filed court action to compel arbitration. In the interim, the Union did *nothing* under Article V of the contract.

The Court of Appeals gave no consideration to this phase of the case. That Court is in accord with the Fifth and Sixth Circuits which agree that the question of "procedural arbitrability" is for the arbitrator. *Radio Corporation of America v. Association of Professional Engineering Personnel*, 291 F 2d 105; *Deaton Truck Line, Inc., v. Local Union 612*, 314 F 2d 418; *Local 748 v. Jefferson City Cabinet Co.*, 314 F 2d 192.

This view is in direct conflict with the First and Seventh Circuits which have held that the Courts should determine whether procedural conditions to arbitration

should be met. ***Boston Mutual Life Ins. Co. v. Insurance Agents' Int'l. Union,*** 258 F 2d 516; ***Brass & Copper Workers Federal Labor Union No. 19322 v. American Brass Co.,*** 272 F 2d 849.

The facts in the instant case plainly demonstrate that this conflict between the Circuits should be resolved. It is of the greatest importance that it be firmly established that the Federal Courts have the right to determine whether procedural conditions to arbitration have been met. Otherwise, those Courts have authority to order arbitration regardless of the use of economic pressures (in lieu of arbitration) by the party who moves for arbitration whenever the use of such pressures fails and, in fact, whenever it suits such moving party.

This area is a matter for the Courts. To hold otherwise, not only encourages breaches of industrial peace but provides no finality to actions taken under a labor contract unless and until passed upon by an arbitrator in a proceeding brought at any time the moving party chooses so to do.

CONCLUSION

The decision below is of extreme national importance in the labor relations field in that it condones resort of arbitration subsequent to the ineffective use of economic pressures. It further permits either party to assert specious grounds for arbitration to void the plain bargain made at the negotiation table.

The decision below is in conflict with your decisions in the Trilogy cases and, further, involves a conflict of decisions among the Courts of Appeal. These matters call for the use of your supervisory power.

It is respectfully submitted that Certiorari should be granted.

THOMAS N. GRIGGS
D. MALCOLM ANDERSON
DAVID B. FAWCETT
OF GRIGGS, MORELAND, BLAIR & DOUGLASS
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,467

GENERAL WAREHOUSEMEN AND EMPLOYEES UNION No. 636

v.

AMERICAN HARDWARE SUPPLY COMPANY, otherwise known as American Hardware Stores, a Pennsylvania Corporation,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued November 22, 1963
Before McLAUGHLIN, KALODNER and GANEY,
Circuit Judges

OPINION OF THE COURT

(Filed March 25, 1964)

By KALODNER, *Circuit Judge.*

Plaintiff ("Union") commenced this proceeding against the employer ("Company") pursuant to Section 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. § 185(a) [1] to compel arbitration. The Dis-

1. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this

trict Court denied Company's motion for summary judgment and granted that of Union; resulting in the instant appeal.

Company maintained its warehouse and office in Allegheny County, Pennsylvania. By a contract between Company and Union, effective September 8, 1960 and until July 1, 1963, union was recognized as the exclusive bargaining agent for Company's employees at its warehouse located in Allegheny County, except management and supervisory personnel, sales representatives, office employees, janitors and watchmen.

The contract provided in Article II, that management of Company, direction of its working force and company operations, the right to introduce, alter or abolish methods and facilities and the right to establish and maintain rules of operation and working practices shall be vested in Company. It also provided that "should any dispute arise concerning this Article, it shall be processed through the grievance procedure."

The contract contained a "no strike, no lock out" provision, subject to the agreement for arbitration. Article III of the contract set out a detailed grievance procedure with provision for arbitration, the Article being applicable to "Differences and disputes . . . as to the meaning and application of, or compliance with, the provisions of this Agreement." Article VI provided for

---

chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

seniority.[2] Article XII[3] provided that when, in the judgment of the company, it decided to discontinue operation

---

2. "Article VI—Seniority.

"(a) Employees shall be regarded as temporary employees for the first thirty (30) days of actual employment, and there shall be no Company responsibility for the re-employment of such temporary employees if they are laid off or discharged during this thirty (30) day period. The Company, if not satisfied as to such of a new employee's progress at the end of the thirty (30) day period, may request a thirty (30) day extension of this trial period from the union. If any employee is retained after sixty (60) days, his seniority shall be fixed from his actual date of employment.

"(b) In the event that employees are laid off on account of reduction in force, employees will be laid off in accordance with seniority rights based on the length of service, with the following exception:

"The Shop Steward, regardless of his actual length of service shall have top seniority in the plant insofar as lay-offs are concerned.

"(c) In the event an employee is laid off due to a reduction in force becoming necessary, the Company will furnish to the employee laid off such reference and recommendation as the facts in each case may justify. When and if additional help is required, such employees so laid off shall be re-employed in preference to outsiders, providing their services are available to the Company within seventy-two (72) hours after notice to the Shop Steward, and written notice by registered mail, sent to the employee at said employee's last address as furnished to the Company by said employees.

"(d) An employee laid off due to a reduction in force shall retain his seniority for a period of twelve (12) months.

"(e) An employee shall be taken off the seniority list at once and no longer regarded as an employee of the Company for any of the following reasons:

of any portion of its warehouse, a severance allowance was payable to an employee permanently terminated unless the Company offered, and the employee affected

---

"1. If the employee quits.

"2. If the employee is discharged.

"3. If the employee fails to report for work from a lay-off within seventy-two (72) hours from the date of the registered letter notifying him to do so.

"4. If the employee is severed in accordance with Article XII of this Agreement."

3. "Article XII—Severance Clause.

"(a) When, in the sole judgment of the Company, it decides to discontinue operation of any portion of its wholesale house; the subject of this Agreement; and if said discontinuance of operations would result in the permanent termination of employment of individuals covered by this Agreement; said terminated employees shall be entitled to a severance allowance in accordance with and subject to the following provisions:

"1. In lieu of severance allowance, the Company may offer an eligible employee a job in the job classification to which his seniority and job ability qualifies him. If offered, the employee shall have the option of accepting such new employment, or requesting his severance allowance.

"2. If the employee accepts such other employment, his continuous service record shall be deemed to have commenced as of the date of starting on the new employment; except for purposes of vacation his continuous service shall be maintained and not be deemed to have been broken by the change in employment.

"3. If said change in employment results in the permanent displacement of some other employee, the latter shall be eligible for severance pay provided he otherwise qualifies under the terms of this section.

"(b) An eligible employee shall receive severance allowance computed on the same basis as provided for vacation pay."

elected to accept, a job in a job classification to which his seniority and ability qualified him.

On January 27, 1961, Company notified Union that it planned to remove its warehouse to Butler County, Pennsylvania, in November, 1961, when construction of a proposed warehouse there would be complete. Union, by letter of its counsel, asked Company whether it proposed to permit its present warehouse employees to follow the warehouse operation. Receiving no reply, counsel again wrote to Company stating that if no reply was forthcoming, the assumption would be made that the Company did not intend to afford its warehouse employees the opportunity to follow their work, and arbitration was therefore requested under Article III of the collective bargaining contract. Company replied refusing arbitration on the grounds that Union's representation under the contract was limited to employees of Company employed in Allegheny County and that Company had the right of severance set forth in Article XII.

In June, 1961, Company gave its warehouse employees at the Allegheny County warehouse notice of the advancement of the completion of its Butler County construction to September, 1961. Union, in August, by telegram to Company, took notice of the fact that Company had employed new personnel in the Butler County warehouse, referred a telephone request that laid-off employees of the Allegheny County warehouse be given preference under the seniority clause of the contract, which request was not answered, reiterated the request and further sought arbitration under the contract. Company replied by referring to its previous letter to Union's counsel.

Thereafter, Company terminated the employment of approximately 68 of its warehouse employees in groups at the Allegheny County warehouse. It presented to each employee a check which included his weekly pay, pro rata vacation pay, and severance allowance. These checks were received under protest, with demand for separate checks for the several items included by Company in the single check. Many of the employees had previously applied for employment in the new Butler County warehouse, but were refused.

The District Court held that an arbitrable issue was presented since Union contended that Company did not have the right, during the contract period, to bring about the discharge of the covered employees by removing their work to another warehouse where new employees were hired, and Company contended that it had the right under the contract to discontinue operations. Accordingly, it granted Union's motion for summary judgment.

We are of the opinion that the District Court was entirely correct.

Company contends that an arbitrable issue is presented only when the language of the agreement is not plain on the merits of the controversy. But arbitration is a contractual procedure. In the light of such cases as United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), we think it would be error to succumb to the enticing temptation to determine at the outset whether the asserted controversy is palpably unfounded on its merits. If the parties, for their

own good reasons, have bargained for determination of controversies by arbitration rather than by a court, such agreement must prevail. The grievance procedure is a part of the continuous collective bargaining process, and in effectuation of that process the court has the duty only to determine whether the reluctant party has breached its promise to arbitrate.

Here, Company agreed to arbitrate all "differences and disputes as to the meaning and application of, or compliance with, the provisions of the agreement." Even matters reserved to management were subject to the grievance procedure. Neither these clauses nor the "no strike clause" contained an exception. The case is, therefore, within the decision of the Supreme Court in the *American Mfg. Co.* case.

There, the Court rejected the proposition advanced by Company in this case, that if the meaning of the provision of the contract sought to be arbitrated is beyond dispute there is nothing to arbitrate. Said the Court, 363 U.S., at pages 567-569:

> "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined

to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware. . . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."

Here, Company insists that an employee lost his seniority under Article VI when his employment was permanently terminated under Article XII, and under that Article Company, in its sole discretion, could terminate the employment when it decided to discontinue operation of any portion of its wholesale house. Union contends that Company violated the contract and its intent by farming out or transferring a substantial portion of its warehousing to another county, without giving its

employees the right to follow the work. Plainly, there is a dispute between the parties as to the "meaning, and application of, or compliance with" the contract.

In preservation of the unfettered arbitration agreed upon by Company and Union, it behooves us to refrain from developing the arguments presented in their respective briefs for the purpose of demonstrating that the issues presented are above suspicion as mere frivolous claim.

Company contends that Union is late in commencing this proceeding, and that the acceptance of the severance pay terminated the employment so that no right to ask for arbitration remained.

In the light of the admonition against "preoccupation with ordinary contract law", 363 U.S. at page 567, we agree with the District Court that these contentions may be appropriately asserted by Company in the arbitration proceedings. They do not affect the essential conclusion that Company and Union have committed themselves to arbitration with respect to persons who were employees while the contract was in effect and when the demand for arbitration was made, where, as here, the subject of the dispute concerns the "meaning and application of, and compliance with" the contract.

For the reasons stated the judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(APPEALS)

EXHIBIT 9
TO COMPLAINT

American Hardware

DATE 8/25/61

APPLICATION CARD No. HO. 23434

NAME: LAST SKLENKA; FIRST JOHN; MIDDLE INITIAL

STREET ADDRESS 33 HILLBURN ST; CITY PHL 7; ZONE; STATE PA

BIRTH DATE 5/3/25; AGE 36 Yrs 11 Mos; HEIGHT 5'8"; WEIGHT 160; MARRIED/SINGLE; DIVORCED/WIDOWED; NUMBER OF DEPENDENTS 3; CITIZEN U.S.A.

	NAME OF SCHOOL	No. years attended	Date graduated	
GRADE SCHOOL	REDUCTION	8	1934	SOCIAL SECURITY NO. 195 18 0709; DRAFT CLASSIFICATION 5A
HIGH SCHOOL	GERDICE	4	1943	MILITARY VETERAN yes ☑ no ☐; STATUS OF ARMED FORCES RESERVE yes ☐ no ☐
				ACTIVE ☐ INACTIVE ☐; SELECTIVE SERVICE CLASSIFICATION yes ☐ no ☑
OTHER EDUCATION	Pa. St. of Barbering	2	1950	PHYSICAL IMPAIRMENTS

TYPE OF WORK DESIRED 1. CLERK 2. Pa 3.

(EMPLOYMENT HISTORY (LIST PRESENT OR MOST RECENT EMPLOYER FIRST))

COMPANY AMERICAN HDWE	ADDRESS Phl 19 PENNA		Length of service From 9/20/48 To 8/25/61
BY JOB CLERK	SUPERVISOR RONALD STITZ	Reason for leaving	
COMPANY	ADDRESS		Length of service From To
BY JOB	SUPERVISOR	Reason for leaving	
COMPANY	ADDRESS		Length of service From To
BY JOB	SUPERVISOR	Reason for leaving	

REFERRED TO APPLICANT BY

EVER EMPLOYED BY AMERICAN yes ☐ no ☐ when

TRADE UNION AFFILIATION LOCAL 636; DRIVER'S LICENSE yes ☑ no ☐; AUTO yes ☑ no ☐; MAKE MERCURY YR. 57

ORGANIZATION CREDENTIALS (exclude references, unused or outdated cards) 1. 2. 3.

TEST DATA	DATE	RESULTS	TEST DATA	DATE	RESULTS

CARD ONLY ☐; LETTER OF APPLICATION ☐; APPLICATION ☐

APPLICANT ☐ APPLICATION ☐ REFERRED TO

DEPARTMENT	DATE	POSITION	DISPOSITION

INTERVIEWERS COMMENTS

	GOOD	ABOVE AVE.	AVERAGE	POOR	REMARKS
APPEARANCE					
ATTITUDE					
ABILITY					
GENERAL IMPRESSION					

COMMENTS

FORM 347

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IN THE

Supreme Court of the United States

No. 195

..... Term, 1964

GENERAL WAREHOUSEMEN AND EMPLOYEES UNION NO. 636 (AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA),

v.

AMERICAN HARDWARE SUPPLY COMPANY (OTHERWISE KNOWN AS AMERICAN HARDWARE STORES), a Pennsylvania corporation,
Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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210 Jones Law Bldg.,
Pittsburgh, Pa. 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE
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IN THE

Supreme Court of the United States

No. .....

..... Term, 1964

GENERAL WAREHOUSEMEN AND EMPLOYEES UNION NO. 636 (AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA),

v.

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Petitioner.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court:

The Respondent Union files this Brief and prays this Honorable Court to deny its grant of a Writ of Certiorari. The Petition seeks to review the decision of the United States District Court for the Western District of Pennsylvania refusing Petitioner's Motion For Summary Judgment and granting the Motion of General Warehousemen and Employees Union No. 636, affiliated with the "Teamsters" (hereinafter called the "Union"), for Summary Judgment. Petitioner's Motion was based, *inter alia*, upon

the payment and retention of agreed severance pay. The Union's Motion was based upon its contention that the matter was arbitrable.

Opinions of the Courts Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 329 Fed. 2d 789 and appears in the Appendix to Petition at page 29.

The opinion of the United States District Court of the Western District of Pennsylvania has not been reported but appears in the Brief and Appendix for Appellants filed in the Circuit Court of Appeals at page 29a.

Jurisdiction

The decision of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on March 25, 1964. The Order denying Rehearing was entered on April 23, 1964.

The jurisdiction of your Honorable Court is invoked under Title 28 U. S. C. A., Section 1254(1).

Questions Presented

Where a labor agreement, containing a no-strike or lockout clause, provides for binding arbitration of all "differences and disputes as to the meaning and application of, or compliance with, the provisions of the agreement", is an employer required to submit to arbitration all differences and disputes during the term of the labor agreement arising out of the employer's predetermined decision to effect discriminatory discharges of its union employees upon the closing of its warehouse and the removal of its business and operations to another warehouse, where the labor

agreement further provides (1) its general purpose was to assure during its term "security and continuity of employment"; (2) that the employer would not engage in any "discrimination of any kind against any employee because of his membership or activity in the union"; (3) the employer recognizes the union "as the sole representative of all * * * employees for the purpose of collective bargaining"; (4) that nothing in the agreement is intended as a waiver of "any rights or protection granted to * * * any employees under the present * * * Federal * * * Laws"; and (5) that the grievance procedure applies to any dispute concerning "the management of the Company; the direction of the working force; the right to plan, direct and control Company operations; the right to introduce new * * * facilities, the right to alter or abolish existing * * * facilities".

Statement of the Case

The jurisdiction of the District Court was invoked under 29 U. S. C. A. 185(a) by the Union (a labor organization within the meaning of and as defined by Title 29 U. S. C. A. Section 152) against the Petitioner (an employer as defined by said Title 29 and Section 152).

Petitioner is a co-operative corporation distributing hardware at wholesale to its retail hardware dealer members in Pennsylvania, Ohio, West Virginia and other states. The Union is the General Warehousemen's Union No. 636, affiliated with the Teamsters (Company Petition, page 6).

Petitioner's only warehouse was in Pittsburgh, Allegheny County, Pennsylvania, and it and the Union have been parties to labor contracts negotiated by them since 1941 (Co. Petition, p. 6)

In 1960, after an economic strike of several months duration (due to the expiration of a labor agreement), the parties entered into a new labor agreement effective from 9/8/60 to midnight 7/1/63 (set forth in full in the Appendix for Appellees filed in the Circuit Court, at page 3b to page 13b).

During these negotiations upon a renewal agreement, and immediately prior thereto, the Board of Directors of the employer covertly determined "to move American from its present facilities" for the purpose of "rid(ding) itself of work practices that have been established over a long period of years * * * by leaving Allegheny County" (Appendix for Appellees filed in the Circuit Court, at page 30b), and by such move "the company would be free of obligation to the present warehouse employees" (Appendix for Appellees, *supra* at pp. 35-36b). The design, plan and scheme of the employer to move its warehouse facilities and business from Allegheny County, during the negotiations with the Union and concurrently with and even after it concluded and executed a renewal labor agreement, to get rid of the Union and discharge its union employees is reflected in the Minutes of the Board of Directors of the employer beginning from February 22, 1960, and extending to October 24, 1961 (set forth in full in the Appendix for Appellees, *supra*, at pp. 29b to 45b).

The labor agreement concluded and executed by the employer with the Union, effective from September 8, 1960, contrary to the covert and predetermined decision of the employer to rid itself of long established work practices, the Union and its Union employees by moving its warehouse outside of Allegheny County, provided (1) that the "purpose" and "consideration" of the agreement was to assure "security and continuity of employment (Appendix

for Appellees, *supra*, p. 3b); (2) that the employer recognized the Union during its term "as the sole representative of all * * * employees for the purpose of collective bargaining" (Appendix for Appellees, *supra*, p. 4b); (3) that the employer would not engage in any "discrimination of any kind against any employee because of his membership or activity in the Union" (Appendix for Appellees, *supra*, p. 5b); (4) that "the management of the Company; the direction of the working force; the right to plan, direct and control Company operations; the right to introduce new * * * facilities; the right to alter or abolish existing * * * facilities" as a management function "shall be processed through the grievance procedure" should any "dispute" arise thereunder (Appendix for Appellees, *supra*, p. 5b); (5) that the agreement is not to be construed as "waiving of any rights or protection granted to * * * any employees under the presen: * * * Federal * * * Laws" (Appendix for Appellee, *supra*, p. 9b); (6) that employees "laid off on account of reduction in force * * * will be laid off in accordance with seniority rights based on length of service" and they will be "re-employed in preference to outsiders" if "additional help is required" providing "their services are available to the Company" after "notice to the Shop Steward and written notice by registered mail sent to the employee at said employee's last address" (Appendix for Appellee, *supra*, p. 8b).

The labor agreement further provided for a no-strike and no-lockout clause (Appendix for Appellee, p. 9b) and binding arbitration (Appellee Appendix, *supra*, p. 7b), upon failure of the parties to settle "differences or disputes between the Company and the Union or employees * * * as to the meaning and application of, or compliance with, the provisions of this Agreement" (Appendix for Appellee, *supra*, p. 5b).

Approximately four months after the employer executed the collective bargaining agreement, the employer notified the Union by letter (January 27, 1961) of its intention to relocate its Pittsburgh warehouse to Butler County and that the completion date for building the Butler County warehouse was set for November 1, 1961 (Appendix for Appellee, *supra*, p. 14b). However, the employer's letter made no mention as to what disposition the Company proposed to do with its current complement of warehouse employees.

On March 13, 1961, the Union sent a letter to the employer acknowledging the contents of the employer's letter of January 27, 1961, and requested the employer to state what disposition the employer intended to make of the warehouse employees upon removal of the operations to the Butler County warehouse, and specifically whether the employer proposes to permit present employees to follow their work to the Butler County plant (Appendix for Appellee, pp. 15-16b).

Not having any reply from the employer to the March 13, 1961, letter, the Union again on June 1, 1961, forwarded to the employer another letter specifically inquiring again therein whether the employer proposes to afford its warehouse employees the opportunity to follow their work upon removal of the warehouse operations to Butler County. The letter further informed the employer that arbitration was requested under the Grievance Procedure of the current labor agreement if the employer did not propose to permit the warehouse employees of the opportunity to follow their work to the Butler County warehouse (Appendix for Appellee, *supra*, pp. 16-17b).

On June 16, 1961, the employer replied by letter wherein it was acknowledged that the subject had been under dis-

cussion between Union officials and employer attorneys, and further refused arbitration upon the grounds (1) the Union representation rights were limited to warehouse employees working in Allegheny County, and (2) the employer had the right of unilateral severance of employees allegedly under Article 12 of the current agreement, set forth in Appendix for Appellee, *supra*, pp. 10-11b (Appendix for Appellee, *supra*, pp. 18-19b).

On August 16, 1961, the Union sent a telegram to the employer that it has employed new employees at the Butler County warehouse contrary to the reemployment rights of laid off employees of the bargaining unit in preference to outsiders and again requested arbitration (Appendix for Appellee, *supra*, pp. 21-22b). By letter dated August 18, 1961, the employer again refused arbitration on the grounds contained in its letter of June 16, 1961 (Appendix for Appellee, *supra*, p. 23b).

The Union sent applications for employment for all the Allegheny County warehouse employees, signed by each employee, to the employer for employment at the Butler County warehouse prior to September 7, 1961, and all of the applications for such employment by the Union's members were rejected by the employer, notwithstanding that the Butler County warehouse was staffed with new employees (said Appendix, p. 24b); (said Appendix, p. 43b); (Co. Petition, p. 39).

On September 15, 1961, and again on October 13 and November 17, 1961, the employer called small groups of its Allegheny County warehouse employees into an office and gave to each of them a termination check which included weekly pay, pro-rata vacation pay and severance pay. In each instance, the Shop Steward, in the presence of and with the approval of the employees, objected to

lumping the aforesaid items in a single check and demanded separate checks for each item to afford each employee the right to refuse the severance pay tendered without prejudice to receipt of his weekly earnings. In each instance, the employer refused to do so (said Appendix, pp. 26 to 28b).

Argument

1. The decision of the Court of Appeals was not erroneous.

As the basis for its request that a Writ of Certiorari be granted, the Petitioner alleges that:

1. This is of extreme national importance in the Labor Management Relations field.

2. This Court of Appeals has decided a Federal Question in conflict with your decisions in the Trilogy, and, particularly, in the American Manufacturing Company case. This calls for the exercise of your Honorable Court's power of supervision.

3. The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals in the same matter.

In reply to 1. above, this case is not of extreme national importance in the Labor Management Relations field because the issues to be arbitrated have already been determined and settled to be arbitrable under the Trilogy decisions.

In reply to 2. above, the Federal Question decided by the Court of Appeals comports with the decisions in the Trilogy and is not in conflict therewith. In this posture, this

Honorable Court need not exercise its power of supervision in this case.

In reply to 3. above, there is no conflict in the decisions among Courts of Appeals and the subject matter of this case is not the same as decided by a Court of Appeals.

These replies will be argued more fully hereinafter.

The Petitioner primarily relies upon the contention that the collective bargaining agreement gives the employer the unilateral right to discontinue its Allegheny County warehouse, to sever employees and thereby to terminate their seniority upon paying the agreed severance pay (Co. Petition, p. 14).

The collective bargaining agreement states:

(Severance Clause)

> "When, in the sole judgment of the Company, it decides to discontinue operation of any portion of its wholesale house; the subject of this agreement; and if said discontinuance of operations would result in the permanent termination of employment of individuals covered by this agreement; said terminated employees shall be entitled to a severance allowance in accordance with and subject to the following provisions * * *" (Co. Petition, p. 7).

The agreement provides further that seniority shall terminate "if the employee is severed in accordance with Article XII (Severance Clause) of this agreement" (Co. Petition, p. 8).

But the collective agreement states something more than that. It also provides that the employer, in consideration of the agreement, assures the employees "security and continuity of employment". The "differences and disputes" contemplated by the grievance procedure and binding arbitration of the instant agreement embraces "the

meaning, application of, or compliance with" the agreement in a situation where the undisputed documentary evidence clearly concludes that before and after the signing of the agreement and concurrently therewith, the employer determined to rid itself of the Union and the Union employees and to rid itself of established work practices by removing its warehouse from Allegheny County to Butler County. In this circumstance, the difference or dispute embraced by the agreement is that the employer never intended to give employees "security and continuity of employment" during the term of the agreement. The "sole judgment" to be exercised by the employer in its decision to discontinue the operation of the Allegheny County warehouse and the severance of the employees is an honest and "good faith" judgment that does not entail deceit, fraud and misrepresentation. Whether there was a breach of the agreement in this respect is a matter for the arbitrator to determine under the terms of the agreement.

The agreement provides further that the employer shall not discriminate against any employee because of his membership or activity in the Union. This provision also modifies and limits the "sole judgment" to be exercised by the employer in any decision to discontinue the warehouse operation and the severance of employees. However, the undisputed documentary evidence of the employer clearly shows that its decision to remove its warehouse was motivated by anti-union animus, resulting in the discharges of all union warehouse employees and their rejection for employment and transfer to the new warehouse, and the employment at the new warehouse of new employees. This again is a breach of the agreement and is a matter for the arbitrator's determination under the terms of the agreement.

The Management Clause of the agreement further subjects "any dispute" thereunder to arbitration involving "the management of the Company; the direction of the working forces; the right to plan, direct and control Company operations; the right to introduce new facilities; the right to alter or abolish existing facilities". The agreement to submit such disputes to arbitration also modifies and limits the "sole judgment" to be exercised by the employer in discontinuing its warehouse operation at one location and removal of the same to another location, severing the warehouse employees from their employment without the opportunity being afforded them to follow their work. Such a dispute also is within the ambit of the grievance procedure and arbitration clause and is delegated to the arbitrator for his "award" which "shall be binding upon all parties hereto" (said Appendix, pp. 5 to 7b).

The agreement also reserves to employees "any rights or protection granted * * * under the present * * * Federal * * * Laws". Here again the parties stipulated that a discriminatory discharge arising under Section 8(a)(1) and Section 8(a)(3) of the Labor Management Relations Act, 29 U. S. C. A., Section 158, is a "difference or dispute" arising under the terms of the agreement and is subject to the arbitration clause.

The Petitioner may be in disagreement with the foregoing outline of the "differences and disputes" with the Union, but that disagreement is exactly the existing "differences or disputes between the Company and the Union or employees * * * as to the meaning and application of, or compliance with, provisions of this agreement" which "shall be settled" by the arbitration procedure (said Appendix, pp. 5 to 7b).

2. The federal question has been resolved by this Court.

This Court and the Circuit Court of Appeals for the Third Circuit consistently has held:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement".[1]

In this connection, it is important to note that no subject is excluded from the grievance and arbitration clause.

The Petitioner urges, since the collective agreement covers "persons employed by the Company at its wholesale house located in Allegheny County, Pennsylvania" (said Appendix, p. 4b), that there is no basis for a claim for arbitration of rights to employment at the Butler plant. Whether the collective agreement is to be interpreted as such, whether the contract has application to employment at the Butler warehouse, and whether the Petitioner had complied with the provisions of the agreement which have prejudiced the rights of employees in any respect is for the arbitrator. The collective agreement specifically provides, without any exclusions, that such matters are arbitrable. Such is the holding of this Court.

The Petitioner also urges since the collective agreement provides for severance allowances and the extinguishment of seniority in the event of discontinuance of operations, that there is no basis for a claim for arbitration. However, the Union and the employees contend that the severance resulting in loss of seniority was motivated and implemented by breaches of the contract by the Petitioner. Here

[1] United Steelworkers v. Warrior and Gulf Navigation, 363 U. S. 574; United Steelworkers v. American Mfg. Co., 363 U. S. 564, Radio Corp. of America v. Assoc. of Professional Engineers, 291 F. 2d 105; Inter. Tel. and Tel. v. Local 400, 286 F. 2d 329; Yale and Towne Mfg. v. Lodge 1717, 299 F. 2d 882, and cases cited therein at 883; Machinists v. Crown Cork and Seal, 300 F. 2d 127.

again, the "differences or disputes" relating to the meaning, application and compliance of the Petitioner's acts and conduct are not matters excluded by the collective agreement, but rather are matters which are included as arbitrable matters.

We respectfully contend that the "differences or disputes" between the Company and the Union or the employees concerns adherence to the terms of the agreement. There is a broad, comprehensive and unrestricted arbitration provision in the agreement. The parties thus should be referred to the arbitrator to determine the issues tendered for an award in accordance with his "informed judgment". The arbitrator is empowered by the collective agreement "to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations * * *"[2]

The Petitioner also suggests as a defense to the arbitrability of such differences or disputes whether the Union can almost a year later compel arbitration. Without attempting to state the numerous efforts of the Union to prevail upon the Petitioner to arbitrate or otherwise settle their differences or disputes, we respectfully submit that this matter should properly be submitted to the arbitrator in connection with whether the Union was in proper "compliance" or "meaning" with the arbitration provision of the agreement. Such ruling comports with the decision of this Court.[3]

We respectfully submit that contrary to the Petitioner's contentions, this case does not have "extreme national importance in the labor-management relations field", nor is

[2] United Steelworkers v. Enterprise Wheel & Car, 80 S. Ct. 1358, 1361

[3] John Wiley and Sons, Inc. v. Livingston, 84 S. Ct. 909, 917

the decision of the Court of Appeals in conflict with the Trilogy decisions, which merits review by this Honorable Court.

The third reason assigned by the Petitioner for granting the Writ by this Court is the apparent conflict between Circuit Courts on the question of whether "procedural arbitrability" is for the arbitrator (Co. Petition, pp. 26, 27). However, the cases cited by Petitioner arose prior to the decision of this Court in John Wiley and Sons, Inc. v. Livingston, 84 S. Ct. 909. In that case, at page 918, this Honorable Court finally settled this question by holding:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator".

Conclusion

The decision below is in harmony with your decisions in the Trilogy cases and involves no conflict of decisions among the Courts of Appeal. It is, therefore, respectfully requested that the Petition be denied.

Respectfully submitted,

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